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Supreme Court, U.S.
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No. 00-982

IN THE

Supreme Court of the United States

UDO BIRNBAUM,

Petitioner,

v.

RICHARD RAY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS BETTY DAVIS AND BECKY MALONE

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REASONS FOR DENYING THE WRIT

Respondents Betty Davis and Becky Malone would respectfully show unto this Honorable Court that Petitioner Birnbaum's arguments are without merit. The United States Court of Appeals for the Fifth Circuit correctly affirmed the District Court's dismissal of Birnbaum's claims, whether due to lack of jurisdiction or for Birnbaum's failure to state a claim upon which relief could be granted. Further, neither the legislative intent of Congress nor previous decisions of this Court prohibit the dismissal of civil RICO claims pursuant to either the *Rooker/Feldman* Doctrine or Federal Rule of Civil Procedure 12(b)(6).

STATEMENT OF THE CASE

In his Petition for Writ of Certiorari, Petitioner Birnbaum (hereinafter "Birnbaum") has misstated the facts of this litigation. Respondents Betty Davis and Becky Malone submit the following summary of facts relevant to this Court's decision.

COURSE OF PROCEEDINGS AND DISPOSITIONS BELOW

On March 30, 1999, Birnbaum filed his Complaint alleging numerous violations of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 *et seq.*, by ten defendants. Nine defendants, including Betty Davis and Becky Malone, filed motions to dismiss or alternatively to abate the proceedings. The tenth defendant, Kerry Young, filed a motion for summary judgment. Birnbaum amended his petition. Thereafter, United States Magistrate Judge Stickney filed Findings, Conclusions, and

Recommendation regarding the dispositive motions. The District Court adopted the Magistrate Judge's findings and dismissed Birnbaum's complaint for failure to state a claim.

On October 14, 1999, Birnbaum filed a notice of appeal, seeking review of the District Court judgment. In an unpublished opinion, the Fifth Circuit affirmed the District Court's judgment on the ground that the District Court had been without jurisdiction to entertain Birnbaum's claim. Relying on this Court's opinions in *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 476, 482, 103 S. Ct. 1303, 75 L. Ed. 2d 206 (1983), and *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415, 44 S. Ct. 149, 68 L. Ed. 2d 362 (1923), the Fifth Circuit noted that a federal district court lacks subject matter jurisdiction to review state-court litigation and issues inextricably intertwined with that litigation. The Fifth Circuit affirmed the District Court's judgment, finding that Birnbaum's federal claims arose solely from state-court litigation and were inextricably intertwined with the state-court litigation.

STATEMENT OF FACTS

William Jones and Birnbaum were neighbors in Van Zandt County, Texas. This litigation arises from a dispute involving a beaver dam on Birnbaum's property. Jones, with the assistance of his attorney, Richard Ray, sued Birnbaum in 1994 under the Texas Water Code in the hope of causing Birnbaum to remove the dam and recovering damages from Birnbaum for damages caused to Jones's real property by the dam (the "Beaver Dam Case"). The suit was filed in the 294th Judicial District Court of Van Zandt County, Texas. At trial, a jury determined that Birnbaum allowed a dam or dams

on his property to cause upstream flooding on Jones's property. The jury awarded no damages to Jones, but awarded him $10,000 in attorney's fees. Birnbaum was unsatisfied with the trial court action, and filed the instant suit in federal district court. Among other things, Birnbaum alleged that the defendants "attempted to enrich themselves by using their relationships in the Court to extort legal fees, moneys, and other valuable things, by the use of fraudulent documents, arguments, and corrupt court process as weapons for malicious prosecution." For cause of action, Birnbaum alleged that the defendants violated 18 U.S.C. § 1961 *et seq.* (civil RICO) by engaging in racketeering activity, conspiracy, and fraud.

Birnbaum asserted numerous specific acts of misconduct on the part of Respondents Betty Davis, Court Coordinator, and Becky Malone, Court Reporter. Birnbaum's sole allegations against Betty Davis concerned the issuance or non-issuance of notices and the relaying of simple information about the Beaver Dam Case. All of the alleged activities were patently "judicial" in nature. The allegation against Malone was that she simply had no record of a transcript of a hearing or hearings.

ARGUMENTS

BIRNBAUM'S FIRST ARGUMENT:

1. The Appeals Court's decision that the *Rooker/Feldman* doctrine bars this civil RICO cause conflicts with the legislative intent of RICO as expressed in this Court's *Rotella v. Wood*. ("*The object of civil RICO is thus not merely to compensate victims but to turn them into prosecutors, 'private attorneys general,' dedicated to eliminating racketeering activity.*")

RESPONDENTS' RESPONSE:

Petitioner Birnbaum makes three discernible arguments in his initial issue. First, Birnbaum contends that the Fifth Circuit erred by deciding his case on different grounds than those relied upon by the federal district court. Second, Birnbaum asserts that the issues in the state-court case were "entirely different" from those in the federal litigation and were not "inextricably intertwined" as determined by the Fifth Circuit. Third, Birnbaum asserts that the Fifth Circuit's *Rooker/Feldman* Doctrine dismissal of his appeal was inappropriate because civil RICO is a statutory cause of action, and not subject to *Rooker/Feldman*. Each of these contentions is erroneous, and Respondents Davis and Malone will address each one in turn.

The Fifth Circuit was entitled to affirm the district court's dismissal on any proper ground. *See Sojourner T. v. Edwards*, 974 F.2d 27, 30 (5th Cir. 1992); *Stegmaier v. Trammell*, 597 F.2d 1027, 1038 (5th Cir. 1979). Indeed, it was incumbent upon the Fifth Circuit to initially address the district court's jurisdiction, as issues of subject matter jurisdiction must precede any determination of the merits of a case. *Ruhrgas v. Marathon Oil Co.*, 526 U.S. 574, 583, 119 S. Ct. 1563, 1569, 143 L. Ed. 2d 760 (1999); *Cook v. Reno*, 74 F.3d 97, 99 (5th Cir. 1996). Jurisdictional issues, particularly the Article III case or controversy requirement, should be examined on appeal even if not raised by the parties or the court below. *See Juidice v. Vail*, 430 U.S. 327, 331, 97 S. Ct. 1211, 1215, 51 L. Ed. 2d 376 (1977); *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 16, 83 S. Ct. 671, 674, 9 L. Ed. 2d 547 (1963). Therefore, the Fifth Circuit did not err in affirming the District Court's judgment on different grounds than those relied upon by that court.

Contrary to his assertion in this Court, Birnbaum's civil RICO issues were inextricably intertwined with the state-court action. The *Rooker/Feldman* Doctrine precludes lower federal courts from exercising jurisdiction over claims that would require them to review a state-court action. *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 483, 103 S. Ct. 1303, 1316, 75 L. Ed. 2d 206 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415-16, 44 S. Ct. 149, 150, 68 L. Ed. 2d 362 (1923). Review of a state-court action is possible only in the state-court system and then to the United States Supreme Court. *Garry v. Geils*, 82 F.3d 1362, 1366 (7th Cir. 1996). The Doctrine bars federal district court review of claims that were actually raised in state court and those claims that are inextricably intertwined with state-court determinations. *Ritter v. Ross*, 992 F.2d 750, 753 (7th Cir. 1993). The key inquiry is whether "the district court is in essence being called upon to review the state-court decision." *Feldman*, 460 U.S. at 483-84 n.16, 103 S. Ct. 1316 n.16. If adjudication of a claim in federal court would require the court to determine that a state-court judgment was erroneously entered or was void, the claim is inextricably intertwined with the merits of the state-court judgment. *See, e.g., Jordahl v. Democratic Party of Va.*, 122 F.3d 192, 202 (4th Cir. 1997). "Where federal relief can only be predicated upon a conviction that the state court was wrong, it is difficult to conceive the federal proceeding as, in substance, anything other than a prohibited appeal of the state-court judgment." *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 25, 107 S. Ct. 1519, 95 L. Ed. 2d 1 (1987) (Marshall, J., concurring).

The Fifth Circuit correctly determined that Birnbaum's federal claims were inextricably intertwined with the state-court action. Birnbaum's entire federal complaint relies on

the assertion that the state-court proceeding is void because of the racketeering activities of Respondents Davis, Malone, and others. In order to grant Birnbaum relief on his civil RICO claim, the federal district court would have had to review the state-court proceedings and determine that they were fraudulent and therefore void. Birnbaum's state action and federal claims were inextricably intertwined, and the Fifth Circuit correctly affirmed dismissal of Birnbaum's complaint on *Rooker/Feldman* grounds.

Birnbaum also asserts that the *Rooker/Feldman* Doctrine is inapplicable to his RICO claims because civil RICO is a statutory cause of action. This contention is unsupported by any authority. Further, this Court has given at least tacit approval to the dismissal of RICO claims pursuant to the *Rooker/Feldman* Doctrine by denying a writ of certiorari in such a case. *See Kamilewicz v. Bank of Boston*, 92 F.3d 506, 512 (7th Cir. 1996), *cert. denied*, 520 U.S. 1204, 117 S. Ct. 1569, 137 L. Ed. 2d 714 (1997) (federal appellate court affirmed a district court's dismissal of RICO claims on grounds of lack of jurisdiction pursuant to the *Rooker/ Feldman* Doctrine, and this Court denied certiorari).

BIRNBAUM'S SECOND ARGUMENT:

2. Whether 18 U.S.C. § 1964(c) "civil RICO" permits the use of the *Rooker/Feldman* Doctrine to keep plaintiff from showing his cause is an important issue of federal law that this Court should establish.

RESPONDENTS' RESPONSE:

Birnbaum has confused this Court's holdings regarding Congress's intent in establishing a civil cause of action for

victims of racketeering. He insists that Congress's legislative intent in enacting civil RICO prohibits the Fifth Circuit's use of the *Rooker/Feldman* Doctrine to "keep a plaintiff from showing his cause." Birnbaum relies on this Court's statements in *Rotella v. Wood* for support of his allegations. That reliance is misplaced.

Birnbaum's reliance on *Rotella* and previous Clayton Act decisions is confused. Neither *Rotella* nor any Clayton Act decision prohibits a finding that the *Rooker/Feldman* Doctrine precludes federal district court jurisdiction, and Birnbaum has cited none. *Rotella* teaches that "there is a clear legislative record of congressional reliance on the Clayton Act when RICO was under consideration." *Rotella v. Wood*, 528 U.S. 549, 120 S. Ct. 1075, 1082, 145 L. Ed. 2d 1047 (2000). "Both statutes share a common congressional objective of encouraging civil litigation to supplement Government efforts to deter and penalize the respectively prohibited practices." *Id.* Therefore, this Court used previous holdings in Clayton Act cases to determine that the "injury and pattern discovery rule" did not govern the start of the limitations period for civil RICO claims. 120 S. Ct. at 1082-83. In fact, the Court used Clayton Act precedent to bar recovery for Rotella and other RICO plaintiffs who did not discover a pattern of racketeering practices within the applicable four-year statute of limitations. *Id.* (citing *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338, 91 S. Ct. 795, 806, 28 L. Ed. 2d 77 (1971). *Rotella* does not address the *Rooker/Feldman* Doctrine.

Birnbaum particularly relies upon this Court's statement that "[t]he object of civil RICO is thus not merely to compensate victims but to turn them into prosecutors, 'private attorneys general,' dedicated to eliminating racketeering

activity." However, he cites no authority for his conclusion that this object of RICO allows a private RICO plaintiff to challenge a state-court decision in federal district court. Federal RICO statutes do not provide a vehicle to attack state-court judgments nor to sanction the conduct of state-court judges taken within the scope of their judicial authority. *See Bogney v. Jones*, 904 F.2d 272, 274 (5th Cir. 1990); *see also Kamilewicz v. Bank of Boston*, 92 F.3d 506, 512 (7th Cir. 1996), *cert. denied*, 520 U.S. 1204, 117 S. Ct. 1569, 137 L. Ed. 2d 714 (1997) (affirming district court's dismissal of RICO claims on grounds of lack of jurisdiction pursuant to the *Rooker/Feldman* Doctrine).

BIRNBAUM'S THIRD ARGUMENT:

3. The Appeals Court's decision to affirm the granting of individual FRCP Rule 12(b)(6) motions to dismiss upon claims of immunity conflicts with this Court's opinion in *Crawford-El.* ("*This Court has never indicated that qualified immunity is relevant to the existence of the plaintiff's cause of action.*")

RESPONDENTS' RESPONSE:

Contrary to Birnbaum's assertion, a federal district court may dismiss a plaintiff's cause of action pursuant to Federal Rule of Civil Procedure 12(b)(6) on the ground that the defendant enjoys immunity from suit. A court may dismiss a complaint under Rule 12(b)(6) where it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 102, 2 L. Ed. 2d 80 (1957). Where a defendant's immunity from suit precludes the plaintiff's claim, a court may properly dismiss the plaintiff's

claim pursuant to Rule 12(b)(6). *See, e.g.*, *Cooper v. Parrish*, 203 F.3d 937, 946 (6th Cir. 2000) (district court properly dismissed plaintiff's claim pursuant to Rule 12(b)(6) on ground of judicial immunity); *Brown v. NationsBank Corp.*, 188 F.3d 579, 588 (5th Cir. 1999) (applying immunity to civil RICO case); *Davis v. Bayless*, 70 F.3d 367, 376 (5th Cir. 1995) (affirming district court's Rule 12(b)(6) dismissal of court-appointed receiver on grounds of judicial immunity).

Birnbaum contended that certain alleged, isolated events on the part of Davis and Malone made them racketeers. The sole allegations against Betty Davis regarded issuance or non-issuance of notices and the relaying of simple information about the Beaver Dam Case. Specifically, Birnbaum complained of the following: (1) issuance of notice of a pretrial conference instead of a trial; (2) informing Birnbaum that his opponent's Motion for Default Judgment was moot; (3) failing to set a hearing on a Petition addressed to the United States Department of Justice; (4) failing to issue an Order of Recusal or Order of Referral of the Motion for Recusal; (5) failing to send a notice that the administrative judge had appointed a new judge; (6) failing to issue a notice that the judge had made a notation on the docket that a mediator had been appointed; (7) issuing a notice of hearing despite the fact that no motion had been filed; (8) upon "information and belief," backdating a notice of setting for trial; (9) failing to issue a notice of a hearing on recusal; and (10) using the wrong words "motion for entry of judgment" in a notice concerning a hearing on a "Motion for Judgment on Verdict." All of these activities are patently "judicial" in nature. The allegation against Malone is that she simply had no record of a transcript of a hearing or hearings. These are precisely the kind of allegations that Rule 12(b)(6), Rule 9(b), and the doctrines of judicial and qualified immunity were designed to prevent.

"It is generally understood that a judge, and those similarly situated, have absolute immunity for judicial acts." *Mylett v. Mullican*, 992 F.2d 1347, 1352 (5th Cir. 1993). Courts examine the character of a governmental officer's duties and the relationship to the parties when determining whether he or she is entitled to absolute immunity. *Id.* (citing *Stump v. Sparkman*, 435 U.S. 349, 98 S. Ct. 1099, 55 L. Ed. 2d 331 (1978)). "If the functions are of a judicial nature then we must weigh the costs and benefits of denying or affording absolute immunity." *O'Neal v. Mississippi State Board of Nursing*, 113 F.3d 62, 65 (5th Cir. 1997). The following six factors are characteristics of the judicial process and are instructive in determining whether a defendants is entitled to absolute immunity: (1) the need to assure that the individual can perform his functions without harassment or intimidation; (2) the presence of safeguards that reduce the need for private damages actions as a means of controlling unconstitutional conduct; (3) insulation from political influence; (4) the importance of precedent; (5) the adversarial nature of the process; and (6) the correctability of error on appeal. *See id.* (citing *Cleavinger v. Saxner*, 474 U.S. 193, 202, 106 S. Ct. 496, 88 L. Ed. 2d 507 (1985)). "No one factor is controlling and the list of considerations is not intended to be exclusive." *Mylett*, 992 F.2d at 1353.

In *Byrd v. Woodruff*, 891 S.W.2d 689 (Tex. App. – Dallas 1994, writ denied), the court of appeals explained the doctrine of derived judicial immunity in Texas as follows:

> Judges are immune from tort liability for acts performed or not performed in the course of judicial proceedings over which they have jurisdiction. *Turner v. Pruitt*, 161 Tex. 532, 342 S.W.2d 422, 423 (1961). When judges delegate

> their authority or appoint persons to perform services for the court, their judicial immunity may follow that delegation or appointment. In Texas, judicial immunity applies to officers of the court who are integral parts of the judicial process, such as a prosecutor performing typical prosecutorial functions, court clerks, law clerks, bailiffs, constables issuing writs, and court-appointed receivers and trustees. . . .

891 S.W.2d at 707; *see also Delcourt v. Silverman*, 919 S.W.2d 777, 782 (Tex. App. – Houston [14th Dist.] 1996, writ denied) (policy underlying derived judicial immunity is to prevent harassment and intimidation that might otherwise result if disgruntled litigants could vent anger by suing person who either presents decision-maker with adverse information or renders adverse opinion).

Further, this Court's opinion in *Crawford-El v. Britton*, 523 U.S. 574, 118 S. Ct. 1584, 140 L. Ed. 2d 759 (1998), is misplaced. *Crawford-El* did not address Rule 12(b)(6) dismissal on immunity grounds. To the contrary, *Crawford-El* discussed the relative summary judgment burden on the parties in a civil rights claim that required proof of motive. 523 U.S. at 598, 118 S. Ct. at 1596-97. *Crawford-El* is inapposite to the present case.

With respect to each of the alleged acts of misconduct, Davis and Malone were clearly performing official duties as Court Coordinator and Court Reporter, respectively, for the 294th Judicial District Court. If particular acts are scrutinized in isolation, then any alleged mistake by a judicial actor in excess of his or her authority would become a "nonjudicial" act. *See Mireles v. Waco*, 502 U.S. 9, 11-12, 112 S. Ct. 286,

2881, 116 L. Ed. 2d 9 (1991). None of the allegations concerning Davis and Malone, however they are scrutinized, meets the pleading requirements of Rule 9(b). As the District Court correctly decided, Birnbaum should not be able to surmount the pleading requirements and Respondents' entitlement to judicial immunity by offering only wild allegations and a clear misunderstanding of the litigation process and Respondents' duties.

The District Court did not err in determining that Respondents were entitled to judicial immunity from Birnbaum's claims.

BIRNBAUM'S FOURTH ARGUMENT:

4. Whether 18 U.S.C. § 1964(c) "civil RICO" permits dismissal of individual defendants under FRCP 12(b)(6) when plaintiff has plead all the elements of civil RICO and brought evidence of each defendant's conduct is an important Issue of Federal Law that this Court should establish.

RESPONDENTS' RESPONSE:

Rule 12(b)(6), and indeed all of the Federal Rules of Civil Procedure, apply to civil RICO actions. Federal Rule of Civil Procedure 1 provides:

> These rules govern the procedures in the United States district courts in all suits of a civil nature whether cognizable as cases of law or in equity or in admiralty, with the exceptions stated in Rule 81.

FED. R. CIV. P. 1. Rule 81 excepts bankruptcy actions, copyright actions, and certain admiralty actions from the application of the Federal Rules of Civil Procedure. *See* FED. R. CIV. P. 81 (comprehensive exceptions to application of procedural rules). Rule 81 does not except civil RICO actions from the applicability of the Federal Rules of Civil Procedure.

In addition to the general applicability of Rule 12(b)(6) to civil RICO actions, several federal appellate courts have affirmed Rule 12(b)(6) dismissals of civil RICO actions. *See, e.g., Stachon v. United Consumers Club, Inc.*, 229 F.3d 673, 677 (7th Cir. 2000) (affirming district court's dismissal of civil RICO claims pursuant to Rule 12(b)(6)); *Langford v. Rite-Aid of Alabama, Inc.*, 231 F.3d 1308, 1314-15 (11th Cir. 2000). *See also Chappell v. Robbins*, 73 F.3d 918, 925 (9th Cir. 1996) (affirming district court's 12(b)(6) dismissal of civil RICO cause of action on ground of absolute immunity).

As noted above, the sole allegations against Respondent Betty Davis regarded the issuance or non-issuance of notices and the relaying of simple information about the Beaver Dam Case, all of which activities were patently "judicial" in nature. The allegation against Respondent Malone was that she had no record of a transcript of a hearing or hearings. However, Birnbaum alleged that the acts of Davis and Malone constituted RICO predicate acts of mail and wire fraud.

The RICO statute provides explicitly that there must be a "pattern" of racketeering activity and that "pattern" is defined to "require[ ] at least two acts of racketeering activity." 18 U.S.C. § 1961(5) (emphasis added); *see also H.J., Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 237-

38, 109 S. Ct. 2893, 2899-2900, 106 L. Ed. 2d 195 (1989); *McLaughlin v. Anderson*, 962 F.2d 187, 192 (2d Cir. 1992) (noting that the "bare minimum of a RICO charge is that a defendant personally committed or aided and abetted the commission of two predicate acts").

Plaintiff alleged violations of subsections (c) and (d) of section 1962 of the RICO statutes. Those subsections provide:

> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate . . . commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity . . . .
>
> (d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection . . . (c) . . . .

18 U.S.C. § 1962(c), (d). A RICO "pattern of racketeering activity requires at least two acts of racketeering activity." § 1961(5). Relevant to Birnbaum's claims, "racketeering activity" means:

> (B) any act which is indictable under . . . title 18, United States Code: . . . section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), . . .

18 U.S.C. § 1961(1). The elements of mail fraud as a predicate offense for civil RICO purposes are:

> (1) A scheme or artifice to defraud or to obtain money or property by means of false or fraudulent pretenses, representations or promises.
>
> (2) Interstate or intrastate use of the mails for the purpose of furthering or executing the scheme or artifice to defraud.
>
> (3) the use of mails by the defendant connected with the scheme [or] artifice to defraud.
>
> (4) Actual injury to the business or property of the plaintiff.

See 18 U.S.C. § 1341; *Landry v. Air Line Pilots Ass'n Int'l AFL-CIO*, 901 F.2d 404, 428 (5th Cir.), *cert. denied*, 498 U.S. 895, 111 S. Ct. 244, 112 L. Ed. 2d 203 (1990). These elements also apply to wire fraud. *Crowe v. Henry*, 115 F.3d 294, 297 (5th Cir. 1997) (Both "RICO mail fraud and wire fraud require, *inter alia*, evidence of intent to defraud . . . .", quoting *Landry*). Fraudulent intent may be found from circumstantial evidence that one party arranged matters with another party in such a way as would facilitate the commission of fraud, especially where the evidence further shows that the first party gained money or advantage at the expense of the second. *Id.*

Finally, Federal Rule of Civil Procedure 9(b) requires specificity in allegations of fraud. To satisfy that rule, it is not enough that the plaintiff simply allege fraudulent intent as a conclusory fact. *Lovelace v. Software Spectrum, Inc.*, 78 F.3d 1015, 1018-1019 (5th Cir. 1996). Furthermore, "rote

conclusory allegations that the defendants 'knowingly did this' or 'recklessly did that' " fail to meet the heightened pleading requirements of Rule 9(b). *Lovelace*, at 1019 (citing *Melder v. Morris*, 27 F.3d 1097 (5th Cir. 1994)).

Birnbaum clearly failed to state a claim under civil RICO. Regarding Malone, Birnbaum did not allege a pattern of racketeering activity. He only complained of one act committed by Malone. Regarding both Davis and Malone, Birnbaum failed to state a claim under civil RICO because he failed to plead allegations that constituted fraud, use of the mails or wire, or a pattern of racketeering. None of the alleged activities of Davis or Malone involved fraud, and Birnbaum failed to adequately allege fraud, which must be specifically pleaded. *See* FED. R. CIV. P. 9(b). Further, Birnbaum failed to adequately plead that Davis or Malone profited from the outcome of the Beaver Dam Case. Birnbaum's Amended Complaint failed in all respects to satisfy his burden.

CONCLUSION

This Court should deny Birnbaum's petition for writ of certiorari. Birnbaum has presented no meritorious grounds for this Court to grant his petition. He has not identified any error in the Fifth Circuit's decision or demonstrated that it conflicts with the decision of another United States Court of Appeals. Further, Birnbaum has not identified an important question of federal law that has not been previously settled or considered by this Court.

Wherefore, Respondents Davis and Malone respectfully request that this Court deny Birnbaum's petition.

Respectfully submitted,

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